APPEAL NO. 050260
FILED MARCH 17, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 3, 2005. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on October 8, 2002, and that the claimant's impairment rating (IR) is 7%. The claimant appealed, disputing the MMI and IR determinations of the hearing officer. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____, and that statutory MMI is October 15, 2002. It was undisputed that the claimant sustained a back injury at work on _____. The parties agreed at the CCH that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd edition) is applicable to this case.

The evidence reflects that (Dr. K), a Texas Workers' Compensation Commission (Commission)-selected designated doctor, examined the claimant and in a Report of Medical Evaluation (TWCC-69) dated November 3, 2001, certified the claimant reached MMI on that date with a 5% IR. The narrative report attached to the TWCC-69 indicates that Dr. K assessed the IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides 4th edition). The hearing officer's finding that Dr. K's report was not based on the correct version of the AMA Guides was not appealed. Dr. K filed an amended TWCC-69 on August 14, 2002, rescinding his earlier assessment of MMI and IR. In a letter dated August 14, 2002, Dr. K stated that the claimant would need another examination to determine his IR but stated he would no longer be able to perform that examination.

A second designated doctor, (Dr. C) was appointed by the Commission. Dr. C examined the claimant on December 5, 2002, and subsequently in a TWCC-69 certified that the claimant reached statutory MMI on October 8, 2002, with a 7% IR using the AMA Guides 3rd edition. The 7% IR was based on Table 49, IIC, unoperated intervetebral disc or other soft tissue lesions, with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm, or rigidity associated with moderate to severe degenerative changes on structural tests. On March 31, 2004, a letter of clarification was sent to Dr. C which stated it enclosed

additional medical records. Dr. C responded to the letter of clarification, and stated after reviewing the information submitted he felt the claimant needed to be re-evaluated.

A third designated doctor, (Dr. A) was appointed by the Commission. The claimant contends in his appeal that Dr. C was not qualified. However, it is not clear from the record why the appointment of a third designated doctor was made. Dr. A examined the claimant on May 26, 2004. In a TWCC-69, Dr. A certified that the claimant reached statutory MMI on October 8, 2003, with a 17% IR. Dr. A utilizing the AMA Guides 3rd edition, assessed an 11% impairment from Table 49, II, for surgically treated disc lesion, multiple levels, with residual symptoms; 4% impairment for loss of range of motion; and 2% impairment of the lower extremity due to nerve root impairment under Table 45. The records reflect that the claimant had a two-level lumbar fusion on October 28, 2003. The narrative report attached to the TWCC-69 of Dr. A indicates that he considered the two-level lumbar fusion, which occurred after the date of statutory MMI, in assessing an IR. The IR is to be determined based on the claimant's condition as of the MMI date considering the medical record and the certifying examination. *See* Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004.

In the Background Information section of the decision, the hearing officer mistakenly noted that the date of claimant's Intra Discal Electro Thermal (IDET) procedure was August 14, 2002. However, the record reflects that on February 12, 2002, a date prior to the date Dr. C certified the claimant reached MMI, the claimant had an IDET procedure at L4-5. It has previously been determined that an IDET procedure is a surgical procedure for purposes of an IR assessment under the AMA Guides. Texas Workers' Compensation Commission Appeal No. 012635-s, decided December 13, 2001; Texas Workers' Compensation Commission Appeal No. 020469, decided April 17, 2002; and Texas Workers' Compensation Commission Appeal No. 020295, decided March 22, 2002. The treatment history recited by Dr. C in his report, does not list the IDET procedure. The IR assessed by Dr. C under Table 49, was based on an unoperated intervetebral disc or other soft tissue lesion. Therefore, the hearing officer's determination that the great weight of the medical evidence supports the certification/report of Dr. C is in error.

We reverse the hearing officer's determination that the claimant reached MMI on October 8, 2002, with a 7% IR. Section 408.125(e), effective for a claim for workers' compensation benefits based on a compensable injury that occurs before June 17, 2001, provides in part that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. The certifications of Dr. A and Dr. K could not be adopted for the reasons previously discussed. The only other certifications of MMI and IR in evidence were from (Dr. G), a carrier required medical examination doctor. Dr. G in a TWCC-69 dated January 30, 2001, reported that the claimant was not yet at MMI. Dr. G in a TWCC-69 dated September 21, 2001, certified that the claimant reached MMI on that date with a 0% IR. However, in the report attached to the TWCC-69, Dr. G indicates that the rating provided was only for the

claimant's abdominal contusion. The report lists a lower back injury with persistent back pain under the diagnosis but no rating for that condition is provided in the report. Finally, there is a TWCC-69 from Dr. G dated June 22, 2004, in which Dr. G certified that the claimant reached statutory MMI on October 8, 2002, with a 10% IR, using the AMA Guides 4th edition. Since there is not an IR in evidence that complies with the AMA Guides 3rd edition and applicable statutory provisions, we have no choice but to remand this case back to the hearing officer. On remand the hearing officer shall: (1) ensure that the designated doctor is still qualified to act in that capacity; (2) seek clarification from the designated doctor, if the designated doctor is still qualified to act in that capacity for this matter and if he is not appointed another designated doctor; (3) make the designated doctor aware of the IDET procedure performed and the parties stipulation that the date of statutory MMI is October 15, 2002; (4) provide all parties with the letter of clarification to the designated doctor and the designated doctor's response and give the parties an opportunity to respond to the designated doctor's response; and (5) make a determination on the claimant's MMI and IR. In the event that the designated doctor is no longer qualified to act in that capacity, the record would need to be held open for the appointment of another designated doctor and for a determination on the claimant's MMI and IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **AMERICAN PROTECTION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge